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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 604

SAM E. MURRELL and MYRTLE H. MURRELL, his wife,

Petitioners,

versus

UNITED STATES OF AMERICA, 8.84 ACRES OF LAND, more or less, situated in Brevard County, Florida, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

OPINIONS BELOW

The opinion of the District Court (Record, page 66-73, 83-85) has not been reported. A copy of the Summary Judgment containing the findings of the District Court, and Order Amending the Summary Judgment, are appended as Appendix I.

The opinion of the Court of Appeals (Record, page 97-107) has been reported at Volume 269 Federal Reporter, Second Series, page 458 (269 F. 2d 458). A copy is appended as Appendix II.

JURISDICTION

The judgment of the Court of Appeals was entered August 12, 1959. An Order extending the time for filing a petition for rehearing to and including September 15, 1959, was entered by the Court of Appeals. Petition for Rehearing was duly filed and denied on September 25, 1959.

Jurisdiction to issue the writ rests on Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

1. WHETHER OR NOT ON SUMMARY JUDGMENT OWNERSHIP OF FLORIDA LANDS DESIGNATED ON A PLAT AS "*RESERVED FOR OCEAN BOULEVARD AND BOARDWALK*" MAY BE DETERMINED AS A MATTER OF LAW TO BE OWNED BY ADJACENT PROPERTY OWNERS RATHER THAN THE RECORD TITLE OWNERS, CONTRARY TO ESTABLISHED FLORIDA LAW.

2. WHETHER OR NOT SUMMARY JUDGMENT MAY BE GRANTED ON THE ISSUES OF OWNERSHIP AND DEDICATION OF FLORIDA LANDS ON THE SOLE BASIS OF A DESIGNATION ON THE FACE OF A PLAT NOTWITHSTANDING THE MATERIAL ISSUES OF FACT CREATED BY CONFLICTING SWORN PROOF.

3. WHETHER OR NOT PETITIONERS WERE DEPRIVED OF THEIR RIGHT TO A JURY TRIAL WHERE THE ESTABLISHED LAW OF THE STATE OF FLORIDA PROVIDES THAT THE INTERPRETATION OF THE WORDING ON A PLAT OF LANDS IS A QUESTION OF FACT FOR A JURY, AND IN ADDITION CONFLICTING SWORN PROOF AS TO DEDICATION AND USE OF THE LAND INVOLVED RESULTS IN A MATERIAL ISSUE OF FACT FOR DETERMINATION BY A JURY.

RULE OF FEDERAL PROCEDURE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure provides as follows:

> "SUMMARY JUDGMENT . . .
> The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

This case arises out of an eminent domain proceeding instituted by the United States against certain lands located in Brevard County, Florida, which were to be used in the

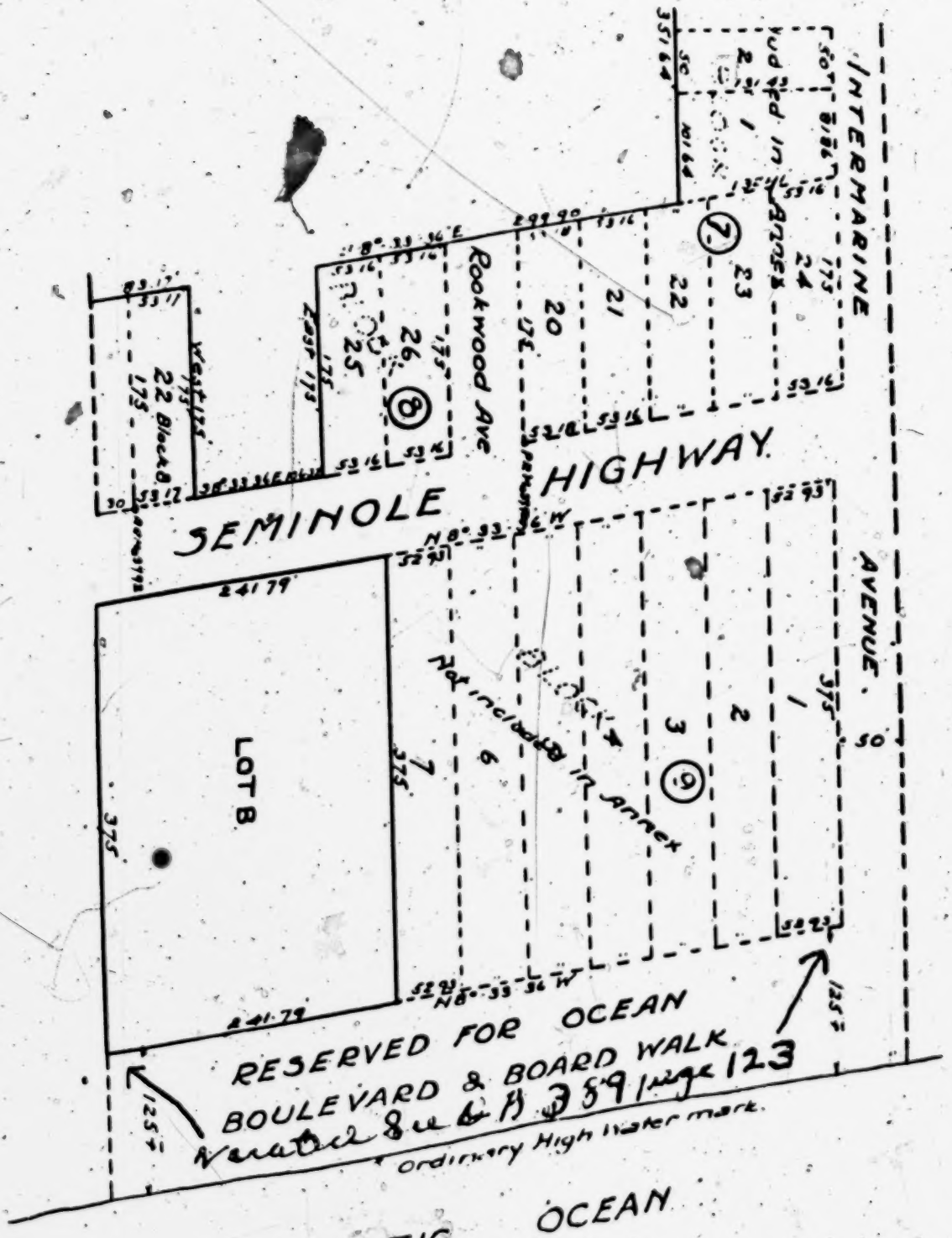
expansion of the Missile Test Center at Cape Canaveral. Litigation was commenced in 1958 when the United States filed in the District Court for the Southern District of Florida a Declaration of Taking for Military Uses (R. 1-10). A complaint in Condemnation was filed for the taking of certain lands, alleging that petitioners and the individual respondents herein had certain interests in property described as:

> "That certain property designated "Reserved for Ocean Boulevard and Boardwalk" east of Lots 1 through 7, of Block 9 of Orlantic Subdivision". (R. 11-15)

The United States has taken the position of a stake holder and did not actively participate in the proceedings before the District Court or in the appeal, and for the purpose of this Statement of the Case, those individuals making claim to the lands adversely to petitioners will be referred to generally as the respondents.

Petitioners filed their claim and sworn proof showing that they were the title holders to said land the subject of this appeal, and other adjoining lands, by reason of a chain of title of record from the original grantors (R. 16-52); that said lands were platted by their predecessors in title in a subdivision not including the lands of the respondents, defendants below (R. 60-61). Petitioners by affidavit introduced into the record a plat of the subdivision in which the lands in controversy were located and designated "Reserved for Ocean Boulevard and Boardwalk" (R. 61). The record discloses that the lands of respondents were not included in this plat of Dune Ridge Annex but were adjacent to the land of petitioners. The land of petitioners is bounded generally on the west by the land of respondents, and on the east by the or-

dinary high water mark of the Atlantic Ocean, and consists of a strip of land 125 feet in width extending approximately 600 feet along respondents' lands and other land owned by petitioners. Other roads or streets were adequate for the passage of traffic and for future roads (R. 63), and respondents had ingress and egress over other public roads. For the purpose of facilitating the understanding of the location and relationship of the properties involved, the plat of Dune Ridge Annex as it appears at page 61 of the record is reproduced hereafter.


INTERMARINE
AVENUE
SEMINOLE HIGHWAY
Rookwood Ave
Not included in Annex
LOT B
241.79
375
RESERVED FOR OCEAN
BOULEVARD & BOARD WALK
Vacated Sub. Deed Book 359 Page 123
Ordinary High Water mark
ATLANTIC OCEAN

Petitioners presented sworn proof that they were the owners and record title holders to said lands and other adjoining lands (R. 16-52); that said property was not dedicated to public use, nor had it ever been used for public use (R. 54); no boulevard was ever developed nor was the property used as a road (R. 54, 63); no boulevard could be successfully constructed on said area because it occupies a slanting sand dune west of the high water mark on the Atlantic Ocean and bordering thereon.

It will be noted from the plat (R. 60-61) that the owners of the land described in the plat dedicated to use of the public only the streets shown thereon as streets. That portion designated "Reserved for Ocean Boulevard and Boardwalk" was never dedicated to the public, but simply reserved for the private use of the owners (R. 54). It will also be noted that the property is not a street or avenue and was never used or intended as a street or avenue because it would have been impossible to successfully construct any street over the property. (R. 55, 63).

The petitioners showed by sworn proof, and the respondents admitted that respondents never had any title to the land and were not the record title owners of the said land (R. 55-56). Respondents, admitting that they have no claim of title to the land, claim ownership solely by reason of their contention that the land was dedicated as a *street* to the public for street purposes by reason of the plat of Dune Ridge Annex, and that by reason of a Resolution of the County Commissioners of Brevard County dated September 9, 1954 (R. 64), abandoning any claim of the public, that they thereby became entitled to said land to the center of the same since they were owners of adjoining lands, and that since the outer edge bordered on the Atlantic Ocean, they were entitled to

the entire 125 feet. As will be pointed out subsequently, these contentions as a matter of law are contrary to the established law of the State of Florida.

The petitioners and respondents, defendants below, filed their respective motions for summary judgments with supporting affidavits, and the District Court on January 27, 1959 entered a Final Summary Judgment against petitioners and in favor of the respondents as to the ownership of the land (R. 66) disregarding the sworn proof of petitioners in the record as to ownership and dedication, and finding solely on the basis of the designation on the plat of Dune Ridge Annex, contrary to the established law of Florida, that the land in controversy "was dedicated and intended for public use as a boulevard and boardwalk when platted according to the plat", and that the entire fee in said land vested in respondents when any public interest in said land was vacated by the Board of County Commissioners of Brevard County, Florida (R. 66-73).

On February 3, 1959 petitioners filed their appeal to the Court of Appeals, and on February 25, 1959 the District Judge amended his Final Summary Judgment (see Appendix I) to state that he did not consider the motion of Nina Youngblood for Summary Judgment because it was not properly before the court (R. 83-85).

After oral argument the Court of Appeals rendered its opinion and judgment on August 12, 1959, affirming the lower court. It is remarkable to note that the Court of Appeals failed to comment or consider the fact that there was conflicting proof and a resulting issue as to the material fact of ownership and dedication of the lands involved. It is likewise remarkable that the Court of Appeals cites as its authority a

dissenting opinion as law of the State of Florida, despite the pronouncement of the Florida court by a majority in this case as well as later cases. Upon Order extending the time for filing of a petition for rehearing the same was duly filed and denied by the Court of Appeals on September 25, 1959, and this cause is now presented to the Supreme Court to review the opinion in this cause on an important State question which has been decided in direct conflict with the applicable law of the State of Florida.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance was based upon the fact that the lands taken in eminent domain proceedings for military purposes were acquired in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); Sections 2663 and 9773 of Title 10, United States Code, which authorizes the acquisition of land for military purposes, the Act of Congress approved August 3, 1956 (Public Law 968, 84th Congress), which act authorizes acquisition of the land; and the Act of Congress approved July 27, 1956 (Public Law 814, 84th Congress), which act made funds available for such purposes.

ARGUMENT AND REASONS FOR THE ALLOWANCE OF THE WRIT

The primary question presented for determination is the ownership of the strip of land in question, and whether respondents by virtue of their ownership of adjacent property acquired title to said land designated "*Reserved for Ocean Boulevard and Boardwalk*". The first question for determination is whether or not the individual respondents became vested with fee simple title to the property of petitioners by reason of the plat of said land by petitioners' predecessors in title and designation "*Reserved for Ocean Boulevard and Boardwalk*".

1. *Where a designated space on a plat is marked "reserved", in accordance with established Florida law, there is no intention to grant to the public and no dedication takes place, only the reservation to the private use of the owner.*

It will be noted from the plat (R. 60-61) that the owners of Land dedicated to the public only the streets thereon but never dedicated to the public the portion designated "*Reserved for Ocean Boulevard and Boardwalk*", but simply reserved the same for the private use of the owners (R. 54). It will be noted that the property is not a street or avenue and was never used or intended as a street or avenue (R. 53, 63). It has been consistently held and is established Florida law that the word "*Reserve*" means reserved for private use, or withholding from dedication. 16 *Am Jur* 370, paragraph 24, Dedication, Interpretation of Plat; *Florida East Coast Railway v. Worley*, 49 Fla. 297, 38 So. 618; *Grade Crossing Land & Improvement v. City of Mobridge*, 165 N.W. 988, 989, 39 S.D. 574; *Swanson v. Gillan*, 173 Atl. 122, 54 R.I. 382; *City of Eugene v. Lowell*, 143 Pac. 903, 904, 72 Or. 237; *Daniels*

v. *Wilson*, 27 Wis. 492, 497; 77 C.J.S. 283 (Citing 124 F. 2d 360, 363).

The Supreme Court of Florida has decisively and consistently held that the word "*Reserved*" means reserved for private use, or withholding from dedication, and in the case of *Florida East Coast Railway* v. *Worley*, 49 Fla. 297, 38 So. 618, on page 623, said:

> "In reaching the conclusions announced as to the interpretation of the reservation clause. We are not unmindful of the technical distinction between a reservation and an exception, and that we have placed upon the word "reserving" a meaning somewhat similar to the word 'excepting'. . . . the word "reserving" . . . was obviously used in the sense of a keeping back or withholding from dedication, and we so construe it".

The opinion of the Court of Appeals overlooked the established law in stating in its opinion, "There can be no question but that the use of these words evinces an intention that this land be dedicated for and used as a roadway for through public passage . . ." Also the court overlooked the fact that this conclusion on summary judgment conflicts with the sworn proof in the record that the land was never dedicated to the public and never used or intended as a street or avenue. (R. 54, 55, 63)

2. ***The record is devoid of any evidence of an "acceptance" as a prerequisite to a valid dedication. In accordance with established Florida law proof as to this issue must be clearly satisfactory and unequivocal.*** Any possibility of acceptance is voided by reason of the fact that the record affirmatively shows that there was no dedication (R. 54) or public use

(R. 54). In the case of *Robinson et al v. Town of Riviera*, 157 Fla. 194, 25 So. 2d 277, the Supreme Court of Florida quoting numerous other cases announced a well established rule as follows:

> "It is well settled in this jurisdiction that so far as the public is concerned the platting of lands and the setting apart of a portion thereof for public use does not in and of itself constitute a complete dedication of such lands for public purposes. *Such action constitutes, at most, a mere offer to dedicate the lands involved, which must be accepted before revocation of the offer in order to complete the dedication.* City of Miami v. Florida E. C. R. Co., 79 Fla. 539, 84 So. 726; City of Palmetto v. Katsch, 86 Fla. 506, 98 So. 352; Burns v. McDaniel, 104 Fla. 526, 140 So. 314; 23rd St. Realty Corp. v. City of Miami Beach, 140 Fla. 257, 191 So. 464. The acceptance of such an offer may be by formal resolution of the proper authorities; or it may be by public user. *At all events, the burden of proving an acceptance of a dedication of lands for the general public rests upon the party asserting it, and the proof of facts constituting an acceptance must be clear, satisfactory and unequivocal.* City of Miami v. Florida E. C. R. Co., supra; City of Palmetto v. Katsch, supra; Burns v. McDaniel, supra; 23rd St. Realty Corp. v. City of Miami Beach, supra; Kirkland v. City of Tampa, 75 Fla. 271, 78 So. 17; City of Pensacola v. Kersey, 115 Fla. 496, 155 So. 730; Miller v. Bay-to-Gulf, Inc., 141 Fla. 452, 193 So. 425; Roe v. Kendrick, 146 Fla. 119, 200 So. 394."

The same rule was reaffirmed in the later case of *Mumaw v. Roberson*, Fla., 60 So. 2d 741, and numerous other cases.

The Court of Appeals recognized this rule and then cites the rule which is applicable where purchasers or grantees in a subdivision have the right to keep dedicated places open for their use even though there has been no public acceptance. The Court, however, in applying this rule, overlooked the factual situation in this case that the adjacent lands of the individual respondents were not within the subdivision platted as Dune Ridge Annex, and were specifically excluded as appears from the plat.

3. *Dedication is a question of fact for the jury in accordance with established Florida law.*

The Supreme Court of the State of Florida in the case of *Wilson v. Dunlap*, Fla. 101, So. 2d 801, reversed a summary judgment based upon a finding from a plat where the lower court found as a matter of fact that "said strip of land was and is intended as a roadway or street", stating:

> "But such a finding of fact based on little more than the face of the plat above described is manifestly improper . . . The cause should be reversed for an entry of order denying the plaintiff's motion for a summary decree, and for submission of evidence on this issue".

The burden of proof, dedication and the acceptance is upon the persons claiming such dedication and acceptance and as pointed out above, such proof must be clear, convincing and unequivocal.

4. *Fee title remained in the grantors in any event subject to the public use or easement indicated; and when such public use or easement was renounced and disclaimed, the entire fee remained in and reverted to the original grantors*

successors in title.

The Supreme Court of the State of Florida has directly ruled upon the exact question of law presented under the facts in this case. In the case of *Wilson v. Dunlap, Fla.*, 101 So. 2d 801, decided on April 2, 1958, where there was a strip of land of subdivision property platted between property designated "beach" and "beach parkway", the court ruled that the subdivider held the subservient fee subject, at most, to any possible easement in favor of purchasers in the subdivision, the court stating as follows:

> "Neither party has at any time, in the proceeding below or upon this appeal, contested the existence of an 'easement for public purposes' in the marginal strip, and there is no assertion that public rights of user have been infringed. The only question is whether the marginal strip on the shore was intended to be set aside for roadway purposes, so as to imply a grant of the fee to at least a portion of the street area as an incident to the conveyance of abutting lots to plaintiff's predecessor. See Smith v. Horn, 70 Fla. 484, 70 So. 435.
>
> "If the area had been designated simply 'beach', there can be no doubt that plaintiff could not prevail, for in that situation the law does not imply a grant of the fee or any exclusive rights to abutting owners, but creates instead an easement in favor of all purchasers in the subdivision, abutting or otherwise. McCorquodale v. Kayton, Fla., 63 So. 2d 906. The subdivider is left with a subservient fee, estopped of course to exercise any rights in the area which will interfere in any way with the enjoyment of the easement by those entitled thereto. Nothing in that doc-

trine however, will prevent a conveyance of this residual fee by the original grantor to another party, for the presumption would be that the grantee took title in full recognition of the easement with which it is encumbered. • • •

"This the plaintiff would apparently concede, but she proceeds on the theory that the labeling of the marginal strip as 'beach parkway' as well as 'beach,' along with the physical facts as to ingress and egress and relative location of arterial connections, indicates dedication for street purposes. She then attempts to extend the doctrine of Smith v. Horn, supra, so as to imply a grant, to herself through her predecessors in title, of the fee to the entire street area extending to the water, as an incident to the conveyance of the abutting upland lots. • • •

"The essential error in appellee's contentions, adopted by the court below in disposing of the case on motion for summary decree, is the idea that any indication on the plat that an incidental use of the marginal strip for street purposes was contemplated would prevent application of the rule of the McCorquodale case, supra.

"That opinion, as already noted, fully delineates the rule established by our decisions that in the case of areas set aside on a plat for multiple public uses, abutting owners have an easement in common with other purchasers in the subdivision for whatever uses may be indicated under the circumstances, but in the ordinary situation no grant of the fee to contiguous property owners will be implied as in the case of streets or roadways. We think the rationale of that and similar

decisions clearly governs the rights and duties of parties dealing with any area platted for such multiple public uses, *even though the area may serve at the same time as a public way for purposes of ingress and egress or general travel.* An abutting owner in this situation would therefore be vested with the right of full use and enjoyment in common with other purchasers and could properly object to any act of the subdivider or others in derogation thereof. He would not, however, have an implied fee in the area so as to be entitled to object to or have cancelled a mere conveyance of such subservient fee by his grantor."

It will be noted that while in the above case there was no question as to the dedication and acceptance, the court held that the fee to property bordering on water and used for multiple uses, even if also used for a street, remained in the original owners. Therefore upon the disclaimer of the Board of County Commissioners of any public use, the entire fee remained and reverted to the original grantors and their successors in title, the petitioners in this case. At most all the respondents, defendants below, ever had, if they had any interest whatever, which is denied by petitioners, would be a simple easement which was vacated and abandoned. Moreover, it will be noted that the respondents' land was not included within the plat of petitioners' predecessors in title and respondents had ingress and egress to their land by means of roads and highways; that respondents had never used petitioners' land designated *"Reserved for Ocean Boulevard and Boardwalk"* as a public roadway or means of ingress or egress to their property. See in comparison *Marshall v. Hartman*, 104 Fla. 143, 139 So. 441; *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861, indicating sanction of the rule that aside from any question of estoppel against a grantor to deny a public

right or use, the description in a conveyance of property as bounded by a street negatives any intent to convey water frontage, and such a conveyance accordingly will not, in the absence of an express provision, warrant an implication or presumption of a grant beyond the center of the street so as to carry the grantee's boundary to the water.

5. *It is remarkable that the opinion of the Court of Appeals cites a dissenting opinion as to the law of the State of Florida for its authority for its holding that the respondents gained title to the fee beyond the center of petitioners' property to the Atlantic Ocean.* The *dissenting opinion*, in the case of *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861, is represented to be the law of the State of Florida despite the pronouncement of the Florida Supreme Court to the contrary by the majority of the court in this same case as well as the later case of Wilson v. Dunlap, Fla., 101 So. 2d 801, 804.

Even the dissenting opinion in the case of *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861, recognizes the right to reserve such land, and states:

> "The riparian rights may be retained in the grantor by expressly reserving a strip of upland along the shore, so as to prevent the passing of title to the water's edge, or by conveying by metes and bounds which metes and bounds describe a contract which has no actual contact with the water, or by conveying the upland according to a plat which is sufficient to create a presumption of the reservation of the riparian rights."

In the later case of *Wilson v. Dunlap*, the court recognized the case of *Banks v. Ogden*, 2 Wall, 57, 69, U.S. 57, 17 L. Ed. 818, wherein the Supreme Court ruled that title passed only

to the middle of a dedicated street, but not to the outer edge bounded by water and in reviewing the Florida law on the subject, the Florida Supreme Court stated as follows:

> "See Marshall v. Hartman, 104 Fla. 143, 139 So. 441; Caples v. Taliaferro, 144 Fla. 1, 197 So. 861, indicating sanction of the rule that, aside from any question of estoppel against a grantor to deny a public right or use, the description in a conveyance of property as bounded by a street negatives any intent to convey water frontage, and such a conveyance accordingly will not, in the absence of an express provision, warrant an implication or presumption of a grant beyond the center of the street so as to carry the grantee's boundary to the water."

6. *Respondents' lands were not included within the plat of Dune Ridge Annex and respondents were therefore not entitled to any claim to petitioners' property by reason of being purchasers in Dune Ridge Annex subdivision or reliance on the plat.* This is purely a factual matter from the record as an examination of the plat of Dune Ridge Annex on the face thereof discloses that the lands of the respondents are specifically not included in the plat. (R. 60-61)

7. *Summary judgment may be granted in accordance with the Federal Rules of Civil Procedure only where there is no genuine issue as to any material fact.*

By reason of the affidavits and sworn proof of petitioners showing that they were the owners of the property involved, that said property was never dedicated for public use or used for public use, and that resopndents had no interest in said lands, there was created a genuine issue of fact as to the

matter of ownership and the related matters so that it was error to grant a summary judgment as a matter of law. The court attempted to weigh the evidence and decide the issues on summary judgment contrary to the provisions of Rule 56 of the Federal Rules of Civil Procedure.

8. *Petitioners were deprived of their right to a jury trial on the issues as provided by law of the State of Florida as well as the issues raised which prevented the granting of a summary judgment.* By reason of the foregoing facts and argument, there was a genuine issue as to material facts and the petitioners were deprived of their right to trial by jury in the granting of a summary judgment against them.

9. *The decision in this cause and the opinion of the Court of Appeals affirming said decision, is in direct conflict with the applicable law of the State of Florida on an important State question.* The Federal courts are required to observe the law of the State of Florida pertaining to ownership of property in eminent domain proceedings. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487. See e.g. *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, 84 L. Ed. 196, where the Supreme Court required conformity to local property law. We respectfully submit that the final summary judgment of the District Court and the opinion and judgment of the Court of Appeals, both in direct conflict with established law of the State of Florida, must be reversed.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

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"APPENDIX I"

SUMMARY JUDGMENT

This cause coming on to be heard upon the Motions for Summary Judgment filed by Stephen R. Magyar and Lieselott Magyar, his wife, Nina Youngblood, Doris Lynch Kissam, Theodore A. Peterson and Olga M. Peterson, his wife, Donald L. Peterson and Dorothy Peterson, his wife, Robert S. Carr and Jeanne S. Carr, his wife, Evelyn B. Condict and Sam E. Murrell and Myrtle H. Murrell, his wife, and notice having been given to all parties concerned and all said parties being represented by counsel, and upon examination of the pleadings and affidavits, the Court finds as follows:

1. That this Court has jurisdiction of the parties and of the subject matter of said Motions.

2. That the lands designated as

> "That certain property designated "reserved for Ocean Boulevard and Board Walk" east of Lots 1 through 7 of Block 9 of Orlantic Subdivision (same being between Block 9 of Orlantic Subdivision and the high water mark of the Atlantic Ocean as per plat thereof recorded in Plat Book 3, Page 78 and also lying east of Block B shown on plat of Dune Ridge Anpex recorded in Plat Book 8, Page 32 of the Public Records of Brevard County, Florida)."

was dedicated and intended for public use as a Boulevard and Board Walk when platted according to the aforesaid plats.

3. That portions of said Subdivision were sold by reference to said plats.

4. That said Boulevard and Board Walk was duly vacated as a public thoroughfare by the Board of County Commissioners of Brevard County, Florida.

5. That the purchasers of those lands lying West and adjacent to said Boulevard and Board Walk acquired the fee simple title to that portion of said Boulevard and Board Walk lying between their lots and the high water mark of the Atlantic Ocean.

6. That the pleadings and affidavits show that there is no genuine issue as to any material fact and that all the moving parties with the exception of Sam E. Murrell and Myrtle H. Murrell, his wife, are entitled to a Judgment as a matter of law.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED:

7. That the Motion for Summary Judgment filed by Sam E. Murrell and Myrtle H. Murrell, his wife, be and the same is hereby denied and the Motions for Summary Judgment filed by Stephen R. Magyar and Lieselott Magyar, his wife, Nina Youngblood, Doris Lynch Kissam, Theodore A. Peterson and Olga M. Peterson, his wife, Donald L. Peterson and Dorothy Peterson, his wife, Robert S. Carr and Jeanne S. Carr, his wife, and Evelyn B. Condiet, be and the same are hereby granted.

8. That Nina Youngblood is the owner in fee simple of all of the lands described in this suit as Tract No. 1140, more particularly described as:

> Lots 1 and 2, Block 9, and closed street on the East, extended to the ordinary high water mark of the At-

lantic Ocean, in Orlantic Subdivision in Section 24, Township 22 South, Range 37 East, as recorded in Plat Book 3, Page 78 of the Public Records of Brevard County, Florida, less and except that part lying within 50 feet of the survey line of State Road A-1-A, Section 7008, said survey line being more particularly described as follows:

Beginning on the South boundary of Government Lot 2 in Section 24, Township 22 South, Range 37 East at a point 1,033.4 feet East from the SW corner of said Lot 2; thence run N. 8° 08′ 30″ W., 2,672.33 feet to the North boundary of said Lot 2 at a point 736.5 feet East from the NW corner thereof.

The above described lands containing 2.45 acres more or less.

9. That Stephen R. Magyar and Lieselott Magyar, his wife, are the owners in fee simple of all of the lands described in this suit as Tract No. 1141, more particularly described as:

Lot 3, Block 9, and closed street on the East, extended to the ordinary high water mark of the Atlantic Ocean, in Orlantic Subdivision in Section 24, Township 22 South, Range 37 East, as recorded in Plat Book 3, Page 78 of the Public Records of Brevard County, Florida, containing 0.84 acres, more or less.

10. That Doris Lynch Kissam is the owner in fee simple of all of the lands described in this suit as Tract No. 1142, more particularly described as:

Lot 4, Block 9, and closed street on the East, extended to the ordinary high water mark of the Atlantic Ocean,

in Orlantic Subdivision in Section 24, Township 22 South, Range 37 East, as recorded in Plat Book 3, Page 78 of the Public Records of Brevard County, Florida, less and except that part of said Lot 4, lying within 50 feet of the survey line of State Road A-1-A, Section 7008, said survey line being more particularly described as follows:

Beginning on the South boundary of Government Lot 2 in Section 24, Township 22 South, Range 37 East, from the SW corner of said Lot 2; thence run North 2672.33 feet to the North boundary of said Lot 2 at a point 736.5 feet East from the NW corner thereof.

The above described tract or parcel of land containing 0.84 acres, more or less.

11. That Theodore A. Peterson and Olga M. Peterson, his wife, and Donald L. Peterson and Dorothy Peterson, his wife, are the owners in fee simple of all of the lands described in this suit as Tract No. 1143, more particularly described as:

Lot 5, Block 9, and closed street on the East, extended to the ordinary high water mark of the Atlantic Ocean, in Orlantic Subdivision in Section 24, Township 22 South, Range 37 East, as recorded in Plat Book 3, page 78, of the Public Records of Brevard County, Florida less and except that portion of said Lot 5 lying within 50 feet of the survey line of State Road A-1-A, Section 7008, said survey line being more particularly described as follows:

Beginning on the South boundary of Government Lot 2 in Section 24, Township 22 South, Range 37 East, at a point 1,033.4 feet East from the SW corner of said Lot 2; thence run N. 8° 08' 30" West, 2672.33 feet

to the North boundary of said Lot 2 at a point 736.5 feet East from the NW corner thereof.

The above described lands containing 0.84 acres, more or less.

12. That Robert S. Carr and Jeanne S. Carr, his wife, are the owners in fee simple of all of the lands described in this suit as Tract No. 1144, more particularly described as:

Lot 6 Block 9, and closed street on the East, extended to the ordinary high water mark of the Atlantic Ocean, in Orlantic Subdivision in Section 24, Township 22 South, Range 37 East, as recorded in Plat Book 3, Page 78, of the Public Records of Brevard County, Florida, less and except that part of said Lot 6 lying within 50 feet of the survey line of State Road A-1-A, Section 7008; said survey line being more particularly described as follows:

Beginning on the South boundary of Government Lot 2, in Section 24, Township 22 South, Range 37 East, at a point 1,033.4 feet East from the SW corner of said Lot 2; thence run N. 8° 08' 30" West, 2672.33 feet to the North boundary of said Lot 2 at a point 736.5 feet East from the NW corner thereof.

The above described tract of land containing 0.84 acres, more or less.

13. That Evelyn B. Condict is the owner in fee simple of all of the lands described in this suit as Tract No. 1145, more particularly described as:

Lot 7, Block 9, and closed street on the East, extended to the ordinary high water mark of the Atlantic Ocean,

in the Orlantic Subdivision in Section 24, Township 22 South, Range 37 East, as recorded in Plat Book 3, Page 78 of the Public Records of Brevard County, Florida, less and except that part of said Lot 7 lying within 50 feet of the survey line of State Road A-1-A, Section 7008, said survey line being more particularly described as follows:

Beginning on the South boundary of Government Lot 2 in Section 24, Township 22 South, Range 37 East at a point 1,033.4 feet east from the SW corner of said Lot 2; thence run N. 8° 08' 30" west, 2672.33 feet to the North boundary of said Lot 2 at a point 736.5 feet East from the NW corner thereof.

The above described tract containing 0.84 acres, more or less.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sam E. Murrell and Myrtle H. Murrell, his wife, have no right, title or interest in and to the lands described in the foregoing paragraphs, as follows:

"That certain property designated "reserved for Ocean Boulevard and Board Walk" east of Lots 1 through 7 of Block 9 of Orlantic Subdivision (same being between Block 9 of Orlantic Subdivision and the high water mark of the Atlantic Ocean as per plat thereof recorded in Plat Book 3, Page 78 and also lying east of Block B shown on plat of Dune Ridge Annex recorded in Plat Book 8, Page 32 of the Public Records of Brevard County, Florida)."

and therefore are not entitled to share in the distribution of the award of compensation for the taking of said lands by

Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Answer and Claim of Sam E. Murrell and Myrtle H. Murrell, his wife, heretofore filed in this cause on May 29, 1958, making claim to said property and funds, be and the same is hereby dismissed, disallowed, and further, that the prayers thereof and each and every prayer thereof be and the same is hereby denied and disallowed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Sam E. Murrell and Myrtle H. Murrell, his wife, Claimants-Defendants, be and they are hereby dismissed as Defendants and as Claimants in this cause, and that the said Defendants-Claimants be denied any relief whatsoever; and said Defendants-Claimants are hereby dismissed from this cause with prejudice, and further, that they shall take nothing by their Answer and Claim to the Property and/or Funds and that they go hence without day and recover nothing thereby.

DONE AND ORDERED IN CHAMBERS this 27 day of January, 1959.

GEO. W. WHITEHURST
United States District Judge

ORDER AMENDING SUMMARY JUDGMENT FILED JANUARY 27, 1959 AND DIRECTING THE INCLUSION OF CERTAIN MATTER IN THE RECORD ON THE APPEAL FILED HEREIN ON FEBRUARY 3, 1959.

It having been made to appear at the hearing held before the Court on February 23, 1959 pursuant to due notice that the summary judgment heretofore filed herein on January 27, 1959 erroneously recited the cause was then before the Court on the motion for summary judgment filed by Stephen R. Magyar and Lieselopt Magyar, his wife, Nina Youngblood, Doris Kissam, Theodore A. Peterson, and Olga M. Peterson, his wife, Donald L. Peterson and Dorothy Peterson, his wife, Robert S. Carr and Jeanne S. Carr, his wife, when in fact the motion of Nina Youngblood was not properly before the Court as it had not then been filed within the time prescribed by the applicable rules of this Court, by reason of which said summary judgment filed on January 27, 1959 should now be amended nunc pro tunc as of January 27, 1959 so as to make the same speak the truth by eliminating therefrom any reference to the motion for summary judgment filed by said Nina Youngblood, and it further having been made to appear to the Court at said hearing on February 23, 1959 that the answer of the defendant, Nina F. Youngblood, to the claim of Sam E. Murrell and Myrtle H. Murrell, his wife, filed September 2, 1958 is material to the record on the appeal of the said Sam E. Murrell and Myrtle H. Murrell filed herein on February 3, 1959, and that pursuant to the authority vested in it by Rule 73 (h) of the Federal Rules of Civil Procedure this Court should order the aforesaid answer of the defendant, Nina A. Youngblood, to the claim of Sam E. Murrell and Myrtle H. Murrell, his wife, filed September 2, 1958, be included in the record to be transmitted to the Appellate

Court under the aforesaid pending appeal by said Sam E. Murrell and Myrtle H. Murrell, his wife, so that the record when filed on said appeal may truly disclose what occurred in this Court, and it is therefore, upon consideration thereof..

ORDERED AND ADJUDGED:

1. That the summary judgment hertofore filed herein on January 27, 1959 be, and the same is, hereby amended nunc pro tunc as of January 27, 1959 so as to eleminate therefrom all reference to the motion for summary judgment filed by Nina Youngblood.

2. That there be included in the record to be filed by Sam E. Murrell and Myrtle H. Murrell, his wife, under their notice of appeal filed herein on February 3, 1959 the answer of the defendant, Nina F. Youngblood, to the claim of Sam E. Murrell and Myrtle H. Murrell, his wife, filed February 2, 1958.

3. That this Order be included by said Sam E. Murrell and Myrtle H. Murrell, his wife, in the before referred to transcript of record on said appeal.

Done and ordered at Orlando, Florida, this February 25, 1959.

GEO. W. WHITEHURST
United States District Judge

"APPENDIX II"

OPINION OF THE COURT OF APPEALS

(269 Federal Reporter Second 458)

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 17696

SAM E. MURRELL and MYRTLE H. MURRELL, his wife,

Appellants,

versus

UNITED STATES OF AMERICA, 8.84 ACRES OF LAND, more or less, situated in Brevard County, Florida, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(August 12, 1959.)

Before RIVES, Chief Judge, and CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: This case arises out of an eminent

domain proceeding instituted by the United States against certain lands located in Brevard County, Florida, which were to be used in the expansion of the missile test center at Cape Canaveral. The land to be taken was a part of the Orlantic Subdivision which had been established and platted in 1924. The original plat of this subdivision divided the area into lots and blocks. Block 9, a parallelogram in shape, has an East to West dimension of 375 feet and a North to South dimension of 612.30 feet. The North 370.51 feet of the Block is divided into seven lots numbered from 1 to 7, each being 375 feet long in an East to West direction and having a width of 52.93 feet. The South 241.79 feet of the Block was designated as Lot B. Separating Block 9 from the Atlantic Ocean is a strip of land 125 feet, more or less, in width. The plat of the subdivision showed this strip as being "Reserved for Ocean Boulevard & Boardwalk". The portion of this strip which abuts the seven numbered lots is the land now in controversy.

In 1923 the portions of this subdivision which were unsold at that time were conveyed to Ryan & Roberts. The seven numbered lots in Block 9 had been sold with reference to the plat prior to this conveyance and were not included in it. These lots are now severally owned by the appellees in this case.

In 1954 the appellees, as owners of lots 1 through 7 of Block 9, and Ryan & Roberts, as owner of Lot B of Block 9, joined in a petition to the Board of County Commissioners of Brevard County to have the public rights in the strip of land designated "Reserved for Ocean Boulevard & Boardwalk" vacated and abandoned. This petition alleged that no boulevard could be successfully constructed on this strip, that

the other roads designated on the plat were adequate for the passage of traffic, and that it would serve the public purpose for the County Commissioners to renounce and disclaim all rights of the County in this strip of land. This petition was captioned "Petition to Vacate and Disclaim Road or Street". The petition asked that the Board exercise its powers under Chapter 343, Florida Statutes of 1953, which authorized County Commissioners to vacate and close public roads. A resolution was passed by the Board of County Commissioners vacating and renouncing any right of the County and the public in "the lands or interest acquired for road or highway purposes in a certain road or street described as follows, to-wit: That street or road designated 'Reserved for Ocean Boulevard & Boardwalk' between Block 9 of Orlantic Subdivision and high water mark of Atlantic Ocean . . ." and stating that "said road or street be and it is hereby vacated, abandoned and closed and the Board hereby renounces and disclaims any right of the County and the public thereto."

The survivor of Ryan & Roberts, Isabel Roberts, subsequently conveyed all unsold portions of the Orlantic Subdivision to the appellants. The deed described the land by metes and bounds, and excepted all of the sold portions.

This litigation was commenced in 1958 when the United States filed in the District Court for the Southern District of Florida a Declaration of Taking and a Complaint in Condemnation covering Lots 1 through 7, of Block 9, of the Orlantic Subdivision. The accompanying description of land being taken described the lots individually and with respect to each specifically included the "closed street on the East extended to the ordinary high water mark of the Atlantic

Ocean". The complaint alleged that the appellees and the appellants had an interest in each of the parcels.

The appellants filed a claim and answer in which they asserted ownership of the Ocean Boulevard tract. Basing their claim on the deed from Isabel Roberts conveying to them all unsold portions of the subdivision, the appellants alleged that the appellees owned only the adjoining lots and were not and had never been owners of any part of this strip. The appellants prayed that they be paid compensation for the reasonable value of this land.

All of the apellees except Nina Youngblood, owner of lots 1 and 2, filed motions for summary judgment on the issue of ownership of the strip of land claimed by the appellants. They relied on the affidavits filed by the appellants, an affidavit filed by appellee, Stephen R. Magyar, owner of lot number 3, and certified copies of their deeds to demonstrate that there was no dispute as to any material fact. Appellee Magyar set forth in his affidavit the manner in which this strip had been marked on the plat of the subdivision and the fact of the petition by the appellees and the appellants' grantor and the subsequent resolution abandoning all public rights in the strip. Magyar claimed title to the portion of the strip abutting his lot by virtue of his deed,[1] and the law of the State of Florida

1 Magyars's deed purports to convey "Lot 3, Block 9, Orlantic subdivision, according to the plat thereof * * *. Together with all uplands, submerged lands, littoral rights and riparian rights lying to the East of the above described property and lying between the North line of said Lot 3 and the South line of said Lot 3, extended eastward out to the three mile limit of the Atlantic Ocean to the extent that such appertain to the property herein described." Appellant Sam E. Murrell stated in a subsequent affidavit that none of the other appellees have an instrument purporting to convey that portion of the strip abutting their lots.

that upon the relinquishment of the public rights in a street, title vests in the abutting property owners.

The appellants also filed a motion for summary judgment. Following a hearing the district court ruled that when platted the strip of land in question was dedicated and intended for public use as a boulevard and boardwalk, that the boulevard and boardwalk was duly vacated as a public thoroughfare, and that the appellees as owners of lands lying West and adjacent to the boulevard and boardwalk acquired fee simple title to the land in question. The court therefore granted the appellees' motions for summary judgment, denied that of the appellants, and decreed that the appellees each owned the portion of the strip abutting his or her lots and that the appellants had no right, title, or interest therein. From this order the appellants have appealed. The United States has taken the position of a stakeholder and did not actively participate in the appeal.

The primary question presented for our determination is whether the district court correctly ruled that the title to the strip of land in question is in the appellees by virtue of their ownership of the adjoining lots. The appellants' first contention is that the district court erred in ruling that the strip of land in question was dedicated for the public use as a boulevard and boardwalk. Pointing to the use of the word "Reserved" the appellants argue that by marking this strip as he did, the original subdivider manifested an intention to reserve this land for his private use. Numerous authorities stating that the words "Reserve" and "Reserved" mean reserved for private use or withheld from dedication are cited. The appellants further argue that even if there was

an intent to dedicate, the dedication was not complete and effective until there had been an acceptance by the proper public authorities. The record here is said to be devoid of any evidence of an acceptance of the offer to dedicate this strip of land.

As a general rule the platting of land into blocks and lots with intervening streets clearly indicated thereon and the sale of these lots with reference to the plat constitutes an offer to dedicate the streets to the public use. *City of Miami v. Florida East Coast Ry.*, 79 Fla. 539, 84 So. 726; *McGourin v. Town of DeFuniak Springs*, 51 Fla. 502, 41 So. 541; 10 Fla. Jur. 11, Dedication, § 12. It is also well established that no particular words are necessary to constitute an offer of dedication to the public use. "It is only necessary that such words be employed as will show the grantor's intent." *Seaboard Air Line Ry. v. Dorsey*, 111 Fla. 22, 27, 149 So. 759, 761; 10 Fla. Jur. 9, Dedication, § 10. In the event the plat is ambiguous, it is settled that the construction must be against the dedicator and in favor of the public. *Florida East Coast Ry. v. Worley*, 49 Fla. 297, 38 So. 618; *Servando Building Co. v. Zimmerman*, Fla., 91 So. 2d 289. However, we do not think there is any ambiguity in the portion of the plat which now concerns us. The appellants' emphasis on the use of the word "Reserved" overlooks the purposes for which this strip was to be reserved. "Boulevard" is defined as a "broad avenue in or around a city". A "Boardwalk" is "a walk or promenade constructed of planking." Webster's New International Dictionary (1929). There can be no question but that the use of these words evinces an intention that this land be dedicated for and used as a roadway for through public passage. It was so regarded by the appellants' grantor of Lot B in the filing

of the petition to vacate as a roadway, the strip which had been platted as a boulevard and boardwalk. This petition probably should not be regarded as a judicial admission because not made in a judicial proceeding, nor as an estoppel because no change of position was made by the appellees in reliance upon it. The petition is, however, evidentiary in impeaching the appellants' present claim that there was no dedication for the purpose of a roadway. See 4 Wigmore on Evidence, 3rd Ed. 119-127, 134-139, §§ 1078, 1080.

We agree with the appellants that as a general rule an offer to dedicate must be accepted before the public acquires any rights in the property. "However, as between a grantor who has conveyed lots according to a plat, and the purchasers or grantees, there is a so-called dedication of the public places delineated upon the plat in the sense that the purchasers or grantees have the right to keep such places open for the uses indicated on the plat designation, even though there has been no public acceptance." 10 Fla. Jur. 16-17, Dedication, §16. *City of Miami v. Florida East Coast Ry.*, 79 Fla. 539, 84 So. 726; *Roe v. Kendrick*, 146 Fla. 119, 200 So. 394. Therefore as against the grantor the rights of the purchasers of the lots and their successors in title, the appellees in this case, are the same regardless whether or not there has been a public acceptance, and the appellants' contention in this regard is without merit.

Our conclusion that the plat of the Orlantic Subdivision evidences an intent by the grantor to dedicate the strip of land in question to the public use as a street or roadway is also fatal to the appellants' next contention. It was their argument that even if there had been a dedication, the fee title

to the strip remained in the grantor subject to the public easement. In support of this argument the appellants cite the recent Florida Supreme Court decision in *Wilson v. Dunlap*, Fla., 101 So. 2d 801 (1958). In that case a strip of land approximately 100 feet wide separated the lots of a subdivision from the Boca Ciega Bay. That strip was designated at various points on the plat as "Beach" and "Beach Parkway". Subsequent to the sale of all of the lots of the subdivision, the grantors executed a deed purporting to convey this strip. The plaintiff, owner of two of the lots abutting the strip, brought an action to cancel the deed. The trial court entered an order cancelling the deed. On appeal the Supreme Court of Florida recognized that there were two competing rules involved. First, it has long been settled in Florida that a person who purchases a lot with reference to a plat of the subdivision takes title to the center of that portion of the street abutting his lot. *Smith v. Horn*, 70 Fla. 435, 70 So. 437. The second rule was stated in these terms: "in the case of areas set aside on a plat for multiple public uses, abutting owners have an easement in common with other purchasers in the subdivision for whatever uses may be indicated under the circumstances, but in the ordinary situation no grant of the fee to contiguous property owners will be implied as in the case of streets and roadways." The court held that the "streets and roadways" rule could not be applied in the absence of a specific finding by the trial court that the marginal area was intended for street purposes exclusively, and therefore the case was reversed and remanded.

In the Wilson case the court also stated, "This court has long been committed to the doctrine that if a plat is complete in itself, and free from ambiguity, it will control * * *. *Porter*

v. Carpenter, 39 Fla. 14, 21, So. 788." We think the plat in this case falls within the scope of the pronouncement. This plat clearly shows that the grantor's intent was for this strip to be dedicated to the public use as a street or roadway. Therefore, there being no manifestation of a contrary intent, under the rule of *Smith v. Horn*, *supra*, the titles of the lots abutting this strip extend at least to the center of the street.

A further question remains. It is whether, under these facts, the appellees' titles extend the entire width of the street to the ordinary high water mark of the Atlantic Ocean. The court, in *Wilson v. Dunlap*, *supra*, pointed out the division of the authority in other jurisdictions on this question, but did not find it necessary to decide the question in that case. Although the question, as it related to the ownership of riparian rights, was discussed at some length in the case of *Marshall v. Hartman*, 104 Fla. 143, 139 So. 441, the court expressly refrained from ruling upon it. However, in *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861, the Supreme Court of Florida approved the rule that "when a street or highway is platted on the margin of the grantor's land, a conveyance of the lands bordering the street carries the fee to the entire width of the street unless expressly reserved." This rule, sound in principle, is controlling here.

Since there is nothing in the case now before us to show an intention on the part of the subdivider to retain any interest in the strip of land in question, the appellees' titles extend the entire width of the strip to the ordinary high water mark of the Atlantic Ocean. See *Johnson v. Grennell*, 188 N. Y. 407, 88 N. E. 161, 13 L.R.A. (N.S.) 551; *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988; *Taylor v. Armstrong*, 24 Ark.

102; 8 Am. Jur. 778-779, Boundaries, § 43.

The appellants next assert that appellees, Nina Youngblood and Stephen R. Magyar, and his wife, derive their titles through tax deeds which vested in them at most a license to the property. No authority is cited in support of this contention. We think it is without merit. *Stuart v. Stephanus*, 94 Fla. 1087, 114 So. 767; *New Fort Pierce Hotel Co. v. Phoenix Tax Title Corp.*, 126 Fla. 552, 171 So. 525; 51 Am. Jur. 937, Taxation, § 1078. This contention, if meritorious, would indicate that a prior owner might be entitled to an award; it would not strengthen the appellants' claim.

The appellants also assert that the appellees cannot contend they purchased these lots in reliance on the dedication of this strip because they were not purchasers in the subdivision in which this strip was located. We see no merit in this assertion either as a matter of fact or a matter of law.

There being no error in the decision of the district court, its judgment is

AFFIRMED